

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2743

Cir. Ct. No. 2004CV162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

AARON T. ROUSE,

PLAINTIFF-APPELLANT,

NETWORK HEALTH PLAN,

PLAINTIFF,

V.

**THEDA CLARK MEDICAL CENTER, INC., CHRISTOPHER P. HUGO,
M.D., MARK WESTFALL, D.O., OHIC INSURANCE COMPANY, THOMAS
L. TOLLY, M.D., JEFFREY S. BURKETT, M.D. AND INJURED
PATIENTS & FAMILIES COMPENSATION FUND,**

DEFENDANTS,

**UNIVERSITY OF WISCONSIN HOSPITAL & CLINICS AUTHORITY,
PATRICK KELLER, M.D., SCOTT DULL, M.D., EVERETT HUGHES,
M.D., AARON JOHNSON, M.D., PHYSICIANS INSURANCE COMPANY OF
WISCONSIN, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. In this medical malpractice action, Aaron T. Rouse appeals from a judgment dismissing his claims against the University of Wisconsin Hospital & Clinics Authority, Patrick Keller, M.D., Scott Dull, M.D., Everett Hughes, M.D., Aaron Johnson, M.D.,¹ and Physicians Insurance Company of Wisconsin, Inc. (collectively, “the UWHCA”). He maintains the trial court erred in holding that as a “public body corporate and politic,” *see* WIS. STAT. § 233.02(1) (2003-04),² the UWHCA is entitled to the protections WIS. STAT. § 893.80 offers “political corporations.”³ We conclude that, based on the plain language of the two statutes and *Lewis v. Physicians Ins. Co.*, 2001 WI 60, ¶25 n.18, 243 Wis. 2d 648, 627 N.W.2d 484, wherein our supreme court deemed the UWHCA a “government-owned facility,” the UWHCA is a political corporation. We affirm.

¹ Keller, Dull, Hughes and Johnson are medical employees of the hospital.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ We certified the following question to the supreme court: “Whether the University of Wisconsin Hospital & Clinics Authority, a statutorily created ‘public body corporate and politic’ that operates in many respects as a private hospital, is a ‘political corporation’ entitled to the procedural protections afforded in WIS. STAT. § 893.80.” The supreme court declined our certification.

¶2 In May 2001, Rouse was involved in a motor vehicle accident. He was initially treated at Theda Clark Medical Center, Inc., and later treated at the University of Wisconsin Hospital & Clinics Authority facility. In September 2004, Rouse filed this medical malpractice action against both facilities, various medical personnel involved in his treatment and the relevant insurers.

¶3 The UWHCA filed motions to dismiss, claiming that Rouse failed to file a notice of claim as required by WIS. STAT. § 893.80(1).⁴ The UWHCA

⁴ WISCONSIN STAT. § 893.80 provides in part:

(1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

claimed its status as a “public body corporate and politic,” *see* WIS. STAT. § 233.02(1), entitled it to the protections § 893.80 offered “political corporation[s].” The circuit court agreed in a thorough and considered written decision and dismissed Rouse’s claims against the UWHCA.

¶4 The circuit court treated Rouse’s motion as one for summary judgment because the parties submitted, and the court considered, materials outside of the pleadings. *See* WIS. STAT. § 802.06(2)(b). We review summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The summary judgment awarded here is driven by the interpretation and application of Wisconsin statutes. The interpretation of a statute is a question of law which we review de novo without deference to the circuit court’s decision. *County of Dodge v. Michael J.K.*, 209 Wis. 2d 499, 502, 564 N.W.2d 350 (Ct. App. 1997). The purpose of statutory construction is to ascertain the legislature’s intent, and our first resort is to the statutory language itself. *State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). Our inquiry ends if the legislature’s intent is clear from the plain words of the statute. *Id.*

¶5 A straightforward analysis of the plain language of the statutes involved leads us to conclude that the UWHCA is entitled to the sought-after protections. WISCONSIN STAT. § 893.80(1) applies to an entity that can be classified as a “political corporation.” WISCONSIN STAT. § 233.02(1) provides: “There is created a public body corporate and politic to be known as the ‘University of Wisconsin Hospitals and Clinics Authority.’” The phrase “public body corporate and politic” tells us that the UWHCA is both a corporation and political. It necessarily follows from this that the UWHCA is a “political corporation” and subject to the provisions of § 893.80.

¶6 Rouse raises several tempting arguments to support his position that the UWHCA is actually a private entity falling outside the scope of WIS. STAT. § 893.80. He maintains that WIS. STAT. ch. 233, the statutory chapter creating the UWHCA, authorizes the UWHCA to operate in a manner similar to a private corporation. *See, e.g.*, WIS. STAT. § 233.03(2) (authority to sue and be sued in its own name); § 233.03(16) (authority to buy, sell or lease real estate); § 233.03(2) and (10) (authority to make contracts). Rouse also points out that the voting members of the UWHCA board are primarily public officials or their appointees and are immune from civil liability absent willful misconduct. *See* § 233.02(4). He questions whether this provision would have been necessary if the legislature had intended for § 893.80 to apply to the UWHCA. *See* § 893.80(4) (prohibiting claims against officers and officials of a political corporation based on acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions); ***Raymaker v. American Family Mut. Ins. Co.***, 2006 WI App 117, ¶13, __ Wis. 2d __, 718 N.W.2d 154 (“When we analyze a statute, we avoid interpretations that would render parts of the statute superfluous.”).

¶7 We also register our own concerns. The legislature created the UWHCA in order to put it on equal footing with private hospitals which did not have to comply with certain restrictions imposed by state law. Regarding the UWHCA as a political corporation actually gives it a competitive advantage over its private counterparts in that its exposure to patient medical malpractice actions is limited. *See generally* WIS. STAT. § 893.80. We expressed these and similar concerns in our certification to our supreme court, but as noted, the court rejected our certification.

¶8 With our certification rejected, we are left with our supreme court’s prior determination that the UWHCA is a public entity. In ***Lewis***, our supreme

court took judicial notice of the fact that, excluding special psychiatric hospitals, “there are only three *government-owned* facilities in Wisconsin at the present time: Memorial Hospital of Lafayette County, Rusk County Memorial Hospital and University of Wisconsin Hospital and Clinic Authority.” *Lewis*, 243 Wis. 2d 648, ¶25 n.8 (emphasis added; citations omitted).

¶9 Rouse claims that this statement is dicta because this determination was not central to the court’s decision. *See id.*, ¶¶1-2 (holding that the surgeon could not be vicariously liable for the negligence of two hospital nurses who failed to count accurately the sponges used in a surgical procedure performed at Lakeland Medical Center). However, in taking judicial notice, the supreme court determined that the UWHCA’s status as a government-owned, and therefore a public not private entity, was beyond any reasonable dispute. *See id.*, ¶25 n.18; WIS. STAT. § 902.01(2) (court may take judicial notice of any fact not subject to reasonable dispute). Further, as the UWHCA points out, the court took judicial notice of this fact when discussing the policy considerations underlying the legislative decision to qualify the exposure of government-owned hospitals under WIS. STAT. § 893.80(3). *See Lewis*, 243 Wis. 2d 648, ¶¶25-26. We cannot ignore such a clear expression from our supreme court. *See Livesey v. Copps Corp.*, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979) (recognizing that the court of appeals is bound by supreme court determinations).

¶10 Rouse also cites *Takle v. University of Wisconsin Hospitals & Clinics Authority*, 402 F.3d 768, 770-71 (7th Cir. 2005), wherein the Seventh Circuit examined the language and legislative history of WIS. STAT. ch. 223 and held that the UWHCA is a private hospital. However, *Takle* is the Seventh Circuit’s interpretation of Wisconsin law and therefore stands as persuasive, but not precedential, authority. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005

WI 111, ¶23, 283 Wis. 2d 555, 699 N.W.2d 205. Our own supreme court has weighed in on this issue and we are bound by its determination.⁵

¶11 In sum, the UWHCA is a “public body corporate and politic,” *see* WIS. STAT. § 233.02(1), entitled to the protections afforded political corporations in WIS. STAT. § 893.80. The circuit court properly dismissed Rouse’s actions against the UWHCA.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁵ Rouse also cites to *Townsend v. Wisconsin Desert Horse Ass’n*, 42 Wis. 2d 414, 167 N.W.2d 425 (1969), and *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 159 N.W.2d 86 (1968). He argues that when these two cases are read together they hold that the UWHCA is not entitled to sovereign immunity and that “entities like the UWHCA [are not] protected by *governmental* immunity.” (Emphasis in original.)

Rouse’s reliance on these two cases is misplaced. First, the UWHCA does not argue that it is entitled to sovereign immunity. Second, in neither of the cases did the court address the question of whether a statutorily created public body corporate and politic falls within the defined parameters of WIS. STAT. § 893.80. *See Townsend*, 42 Wis. 2d at 422-24 (holding that the phrase “governmental subdivision or agency thereof” found in the former § 893.80 did not apply to the state or its agencies and that the Wisconsin Exposition Department, a state agency, was protected by sovereign immunity); *Majerus*, 39 Wis. 2d at 314-16 (holding that the Wisconsin State Armory Board, denominated a “body politic and corporate,” constituted an independent body politic falling outside the scope of sovereign immunity, but also assuming that the Board was subject to the former version of § 893.80 in the context of a pleading issue).

